

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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FIDEL KELLY,  
Complainant,

vs.

TRUSTEES OF THE STATE COLLEGES IN COLORADO, MESA STATE COLLEGE,  
Respondent.

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THIS MATTER came on for hearing on May 26, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared and represented himself. Respondent appeared through Joseph F. Haughian, Assistant Attorney General.

**MATTER APPEALED**

Complainant, Fidel Kelly ("Complainant" or "Kelly") appeals his disciplinary termination from employment by Respondent, Mesa State College ("MSC" or "Respondent"). Complainant seeks reinstatement and back pay.

For the reasons set forth below, Respondent's action is **affirmed**.

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's disciplinary action against Complainant was arbitrary, capricious or contrary to rule or law.

**FINDINGS OF FACT**

1. Kelly was a Custodian I at MSC at all times relevant herein.
2. Kelly's annual performance rating for the period mid-2000 to mid-2001 was Commendable.
3. In the period mid-2001 to mid-2002, Kelly began to have problems on the job. On Kelly's 2001/2002 evaluation, which was an overall "Meets Expectations," he received an Unsatisfactory Performance Rating in the Communication section, which noted, "is courteous to faculty, staff and students; disruptive in staff meetings; argumentative;

confrontational towards supervisor/team leader.” He also received an Unsatisfactory Performance Rating in the Interpersonal Skills section, which noted, “responsive to external customers; indifferent to team and team goals.”

4. Kelly signed, “agree,” on this evaluation.
5. Kelly’s 2002/2003 annual evaluation rating was an overall Meets Expectations. In the Communication section, he received an Unsatisfactory Performance rating, which noted, “At times comes across as very aggressive with supervisors & when asked to follow supervisors directives he indicates that he is unwilling to do what is asked of him.” In the Interpersonal Skills section, however, Kelly’s supervisor raised him to a “Meets Expectations” rating, in recognition of his “real effort to work smoothly and positively with the custodial staff sharing the same building, being a team player.”

### **October 18, 2003**

6. One of Kelly’s duties was to assist in setting up conference rooms for meetings and events on an “as needed” basis.
7. Sodexho is a private corporation that contracts with MSC to provide all catering services on campus. Christine Wilson is the catering resident dining manager for Sodexho at MSC.
8. On October 18, 2003, a group was preparing a conference room for a meeting. Wilson paged Kelly to request his assistance in setting up the room. Kelly was the on-call custodian to provide that assistance.
9. Wilson asked Kelly to bring chairs to the meeting room and set them up. When he arrived, Kelly put the chairs in a pile in a rough manner, slamming some of the chairs around in the process. He refused to set them up at that time.
10. The group in the meeting room complained to Wilson that Kelly had acted unprofessionally.
11. Later that day, Wilson was in the meeting room with Kelly. She asked him to help close the sliding door (an enormous wall-like door) that divided two large meeting rooms. Kelly tried to help for a moment, but found it very difficult to move the heavy door.
12. Kelly became frustrated, saying this was not his job, not his problem. He said to Wilson that that “was the best he could do” and he walked off without providing the assistance she needed. He may have indicated he would put in a work order for the door.
13. Wilson reported Kelly’s misconduct to her supervisor.

### **October 21, 2003 Incident**

14. Kelly's direct supervisor was Mary Williams, Custodial Supervisor at MSC. On October 21, 2003, Kelly came to Williams' office to discuss the October 18 incident. Williams talked to him about customer service, reminding him he had just completed the customer service training for MSC employees.
15. Kelly denied having behaved inappropriately. Then, he began to shout at Williams. He paced in front of her desk, stopping to lean over into her face and point at her while yelling. His voice was a 9 on a 10-point scale of volume.
16. Williams was very intimidated and frightened by Kelly's loss of control and angry outburst.

#### **October 29, 2003 Incident**

17. On October 29, 2003, Williams had another meeting with Kelly. She told him she had spoken to someone present on October 18 who had witnessed his misconduct and was adamant that he had thrown the chairs. Kelly responded that he was not going to "kiss up to anyone," if that was what she wanted. She responded that all they wanted out of him at MSC was good customer service. He responded in a loud and threatening voice, "what you're asking for is impossible." He paced in front of her desk as he talked to her. Then he left.
18. Once again, Williams felt very fearful of Kelly. She reported his behavior on October 21 and 29 to her supervisor.

#### **November 4, 2003 Incident**

19. On November 4, 2003, Kelly informed Williams that he was going to return to the Sodexho office to apologize to Wilson for his conduct on October 18, 2003. Williams responded that that was a good idea.
20. When Kelly arrived in the Sodexho office, instead of apologizing, he lost his temper again. He approached an employee he had never met before. Despite the fact he had no idea who this woman was, he leaned down into her face in a confrontational and threatening manner and said, "Do you have a problem with me?" He spoke in a loud voice with his hands up in the air.
21. Wilson saw this and intervened, introducing herself as the individual who had reported his misconduct on October 18. Kelly responded to this by verbally attacking Wilson. He said, "What have I ever done to you?" She stated that he had been very unprofessional and that their job was to provide customer service.
22. Kelly became very angry, stating, "Am I supposed to just smile and do whatever I am told? What am I supposed to do, kiss everyone's ass?" Wilson stated that other custodial staff are always very helpful. She then asked him to leave.

23. Kelly responded angrily, "I'm never going to work in this fucking building again." He also shouted to Wilson, "You're not going to cost me my job, I'll cost you yours first."
24. Wilson was frightened by Kelly's angry, threatening outburst. She informed a supervisor about his conduct, and filled out an incident report.
25. Kelly returned to Williams' office after this incident and reported what had occurred to her. She commented he had not accomplished his goals of apologizing, had he. He said, "What am I supposed to do, smile and do a little dance?"

#### **November 7, 2003 Incident**

26. On November 7, 2003, Kelly was in Williams' office to review his schedule with her. It was a routine meeting. In the course of the meeting, Williams mentioned a note Kelly had posted on a bulletin board to his co-workers.
27. The note concerned the following. During a recent shift, Kelly had discovered that a light ballast needed to be replaced. He left a note on the bulletin board requesting that the custodian on the next shift order the part. That person wrote Kelly back, stating it was Kelly's responsibility to write up the order.
28. Kelly then posted a note on this board stating that he was tired of doing others' work, "tired of the same old shit . . . ." This bulletin board was located in an area where students could see it.
29. In referencing this event on November 7, 2003, Williams stated to Kelly that because he was the one who had discovered the missing part, it was his responsibility to write up the work order. She also questioned his professionalism.
30. Kelly became extremely angry at Williams for confronting him about the note. He began to yell at her again, at a 9 on a 10-point scale. He leaned over her desk, in her face, as he yelled, swearing, leaving her office twice and returning, out of control.
31. Kelly also pounded on Williams' desk repeatedly as he yelled at her. Items on her desk jumped up and down as he pounded. He yelled, "Goddamn it Mary I'm tired of this, doing everyone else's work." Then he left.
32. After Kelly left her office, Williams immediately called Jeanne Durr, the Human Resources Director for MSC.
33. Williams was very frightened of Kelly during and after this incident.
34. Kelly regretted this incident, and that evening called Williams to apologize.

### **Jeanne Durr**

35. Jeanne Durr is the appointing authority over all classified employees at MSC.
36. Durr had recently attended a meeting with Kelly to address similar conduct. On May 3, 2003, Durr, Kelly, and Paul Arnhold, Assistant Facilities Director at MSC, had held a meeting to address Kelly's aggressive and confrontational behavior towards co-workers and supervisors at MSC. At the meeting, Kelly told a childhood story about how his misbehavior at school had resulted in his family moving back to an old neighborhood he had never wanted to leave. He also reported that by shouting and being angry he was able to obtain compliance from his children. He informed Durr that since his angry outbursts had worked for him his entire life, at this stage in life he had no intention of changing his behavior. Lastly, he informed Durr that he had two switches, "on" and "off."
37. At that meeting, Durr responded that while that type of behavior may work for Kelly at home, it was completely unacceptable in the workplace. She stated that he needed to always be in the "off" position at work.
38. Durr also informed Kelly that any future temper outbursts at work would be dealt with severely.
39. In late October 2003, after Durr was informed about Kelly's behavioral outbursts on October 18, 21, and 29, she planned to issue a corrective action to Kelly.
40. However, before Durr had drafted the corrective action, she learned about the additional incidents on November 4 and 7, 2003. At that point she determined the situation was serious enough to warrant possible disciplinary action.
41. Durr sent a notice of R-6-10 pre-disciplinary meeting to Kelly.

### **Pre-Disciplinary Meeting**

42. On December 1, 2003, Kelly, Durr, and Arnhold attended the pre-disciplinary meeting. Kelly chose not to have a representative present. A member of the Grand Junction police force assigned to MSC was also present in the room. The meeting was tape-recorded.
43. Durr presented all pertinent information about Kelly's recent misconduct at work to Kelly. She also reviewed the occasions over the last two years on which she had met with him to discuss his previous incidents of temper outbursts. She told him that his episodes "indicate a consistent and long term pattern of unacceptable behavior."
44. Durr then asked Kelly to provide any information he felt she should consider.

45. Kelly spoke at length at this meeting. He admitted he “might have been a little rude” to the Sodexho employee, meaning Wilson. He denied that he had raised his voice, thrown chairs, or that he was upset, on October 18.
46. Regarding his November 7 meeting with Williams, Kelly reenacted how he had lost his temper, actually banging his fist on the table. The transcript of the R-6-10 meeting indicates he stated, “I went back to Mary’s office and I was kind of upset because it didn’t work out the way I thought it would work out. And I went to her office and I said, ‘Mary, God dam it,’ (pounding fist on table during meeting). I slammed my hand on her table (pounding fist again). I said, ‘Darn it, Mary,’ I says, ‘you know I’m tired of trying to help these people. It seems like there’s nothing I can do to satisfy them and I want you to take me off this f . . . ing Saturday list.”
47. The transcript of the meeting indicates that Kelly then, for a third time, pounded his fist on the table, as he described his outburst with Williams.
48. Kelly further stated that when he arrived at home that evening he thought about his behavior and knew he had been “wrong,” so he called Williams and apologized. He indicated he told her he “needed some help” and requested the Colorado State Employee Assistance Program (“CSEAP”) counselor’s telephone number.
49. Kelly indicated he had met with the CSEAP counselor, and that he was “seeking help” with both the CSEAP counselor and Con Pyle. Pyle is a retired reverend from the Veterans Administration who offers counseling services. Kelly tendered their telephone numbers and written materials from them to Durr.
50. Once Kelly had completed his statement, Durr asked him to address his past behaviors, and to “give us some reason to believe that they won’t occur in the future.” She asked what would lead them to believe that the future would be different from the past.
51. Kelly responded that he needed to continue working with the CSEAP counselor and Con Pyle. He said that he needs to use a technique of treating others at work as if they were in the same church congregation, or the same family, and remember to give them due respect and that all they want is to have the job done.
52. Kelly signed releases for Durr to speak with each of these counselors.
53. Kelly reported that he had had 48 previous sessions with Pyle, and that he had seen the CSEAP counselor three or four times.

#### **Additional Investigation**

54. Later that same day, Durr contacted both counselors by telephone for input on Kelly’s situation. The CSEAP counselor reported that she had met with Kelly several times. She

opined that he has extremely poor impulse control, and acts out inappropriately even during counseling sessions, by jumping up and raising his voice. She felt that Kelly did not recognize that he would have to modify this behavior in order to work with others.

55. Pyle reported that Kelly had seen him for court-ordered counseling for domestic violence issues. He stated that Kelly exhibits extremely childish behavior, and Kelly believes that acting out in a threatening or violent manner is the way to get what he wants. Pyle was unable to predict whether Kelly's behavior in the future would change.
56. Durr was faced with two counselors familiar with Kelly, neither of whom expressed optimism regarding Kelly's potential for change.
57. Durr also spoke with Wilson and Williams, both of whom were fearful of Kelly.
58. Durr reviewed Kelly's performance evaluations from the previous three years. These evaluations demonstrated a pattern of aggressive and confrontational behavior towards co-workers and supervisors.
59. Durr noted that Kelly's angry outbursts had historically been limited to internal MSC staff in his unit or supervisors. His evaluations showed that his inappropriate behavior had never expanded to external customers.
60. Based on the information Durr collected through her in-depth investigation, she concluded that Kelly's behavior was escalating in two ways that were particularly troubling to her. First, Kelly's most recent outbursts were directed at external customers, non-MSC staff – one Sodexho employee who was a complete stranger, and Wilson, another Sodexho employee. Second, Kelly's angry outbursts at Williams had now extended beyond the verbal to become physical in nature. Durr was extremely troubled by Kelly having pounded on the table as he yelled at Williams, and his apparent inability to recognize its traumatizing effect on Williams.
61. Durr concluded that due to Kelly's inability to control his own behavior while at work, she could no longer ensure individuals' safety on the MSC campus. Of paramount concern in her mind were the students, whose parents had entrusted their sons and daughters to the care and protection of MSC.
62. Durr decided she had no choice but to terminate Kelly, and did so on December 4, 2003. The letter cited the incidents in October and November of 2003, and noted several previous meetings to address his temper, including in December 2001 and May 2003. She concluded in the letter that his "consistent and long term pattern of unacceptable harassing and threatening behavior" constitutes failure to perform competently, willful misconduct, and inability to perform, under State Personnel Board Rule R-6-9. She also concluded he had violated the "Governor's Executive Order against Workplace Violence." [This executive order was not introduced into evidence.]

63. Durr was a credible witness. Her termination of Kelly was motivated by her belief that she could not be certain he would refrain from further acts of workplace violence in the future.
64. Kelly claimed at hearing that MSC leaders were biased against him due to his previous employment history. This claim is found to be without merit.
65. By way of background, Kelly had worked for MSC during the 1990's and was terminated on a date unknown. After successfully appealing that termination, Kelly was reinstated to his Custodian I position in early 2000.
66. MSC gave Kelly a fresh start upon his return to MSC in 2000. The administration provided him with a new supervisor who was unfamiliar with his previous employment history at MSC. In addition to rating Kelly at a Commendable level upon his return, MSC supervisors allowed Kelly to go home for lunch, to bring his son to school during a break, and to work a shift he requested.
67. MSC administrators were not biased against Kelly due to his performance history at the college.

#### **Custodial Use of Chemicals**

68. Kelly claimed that his outbursts of anger were due to his use of toxic chemicals on the job at MSC. He failed to prove this at hearing.
69. Kelly also claimed that MSC forced him to work with more toxic chemicals than other similarly situated employees, moving him from building to building to accomplish this. To the contrary, MSC accommodated Kelly's request to work in a specific building on a specific shift, and Kelly did not work with toxic cleaning agents more than other custodial staff.
70. All MSC custodians use chemical-based cleaning products on the job. MSC trained the custodians, including Kelly, in how to read the labels regarding toxicity; proper safety precautions to be taken when using the products; and necessary use of protective equipment. Respondent properly trained all custodial staff, including Kelly, in the appropriate use of safety equipment.
71. The directions on some of the cleaning products required use of safety goggles, facemasks, protective boots, or protective gloves.
72. MSC made available to all custodians the necessary safety equipment to be worn when using all chemicals. Product inventory sheets were available for employees to order any safety equipment sought; such products were delivered weekly. Supervisors would provide such equipment on an emergency basis if necessary.



73. Kelly often neglected to use the safety equipment. He did not provide any reason for this.
74. Kelly sometimes developed headaches, bloody noses, and dizziness during and after working with the cleaning products without protective gear. This was no fault of Respondent, as Kelly failed to use the protective equipment in accordance with required safety procedures.
75. Kelly never filed a grievance regarding his use of chemicals on the job at MSC.

## **DISCUSSION**

### **A. Burden of Proof**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

### **B. Complainant committed the acts upon which discipline was based**

Complainant committed the acts upon which discipline was based, as the Findings of Fact above make clear. While Kelly sought to minimize the seriousness of his threatening and violent actions at hearing, his temper outbursts constituted willful misconduct.

Kelly argued that MSC officials were motivated to terminate him not on the basis of his

conduct at work but because of his history of having successfully appealed his previous termination of employment. To the contrary, MSC gave Kelly a fresh start upon reinstatement in 2000, and he alone is responsible for his performance problems.

**C. Respondent's action was not arbitrary, capricious, or contrary to rule or law**

Kelly contends that he should not have been terminated because his therapy was moving in a positive direction. While Kelly is to be lauded for utilizing the critically important services of CSEAP, unfortunately in this case the weight of evidence available to Durr led her to conclude he could not change his behavior. Kelly had engaged in an ongoing pattern of aggressiveness and confrontational behavior towards co-workers and supervisors for years. When Durr confronted him with this pattern in May 2003, Kelly openly defied her authority by stating that this behavior had reaped rich results for him over a lifetime, and that he planned never to change.

At the conclusion of that May 2003 meeting, Durr clarified that any future failure to control his aggressive behavior at work would be dealt with severely. In addition, Durr informed Kelly that he needed to remain in the "off" position at work at all times.

Aware of this warning, Kelly again defied Durr's authority by attacking a complete stranger, Wilson, and Williams, in October and November of 2003. These attacks were punctuated by their increasingly random and physical nature. At that point, Durr was fully justified in concluding that Kelly lacked the appropriate deference to workplace norms necessary to work at MSC. Nonetheless, impressed by the fact he was seeing two counselors, she was willing to inquire further.

Durr undertook a thorough investigation of Kelly's future prospects for change by contacting both of his counselors. Unfortunately, neither was able to assure Durr that Kelly's therapy was moving in a positive direction. In fact, both were notably pessimistic about his ability to change. Durr reasonably relied on their input in making her decision to terminate Kelly's employment.

Durr had a duty to place the safety of all individuals present on the MSC campus first. It was appropriate for her to give particular attention to the protection of the students placed in MSC's charge. Parents entrusting their children to a college institution may reasonably expect college administrators to maintain an environment free of harassment and intimidation by college employees. Kelly's October confrontation of the Sodexo employee could easily have been directed at a work study student. Durr concluded correctly that her duty to protect the individuals present on campus overcame Kelly's desire for one last chance.

**CONCLUSIONS OF LAW**

1. Complainant committed the acts upon which the discipline was based;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

## **ORDER**

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_ day of  
**July, 2004**, at  
Denver, Colorado.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln St., Suite 1420  
Denver, CO 80203

### **NOTICE OF APPEAL RIGHTS**

#### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript

prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

#### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

#### ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

#### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of **July, 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Fidel Kelly  
519 West Colorado Avenue  
Grand Junction, CO 81505

And in the interagency mail to:

Joseph F. Haughian  
Assistant Attorney General  
Employment Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods